No. 84-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOLORES E. MOE, ERIC R. MOE, KRIS L. MOE and LEIF A. MOE; JUDY ELAINE RENZELMAN, individually, and as Conservator and next friend of Minor BRAD ALLEN RENZELMAN; ELAINE L. WHISTLER, PAUL W. WHISTLER, DIANE WHISTLER AWALT; JOAN ELAINE ANDERSON, individually, and as Guardian ad litem and next friend of Minors ELIZABETH JOAN ANDERSON and CHRISTOPHER ANDREW ANDERSON; BEVERLY L. MILES; and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation,

Petitioners,

v.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, FALCON JET CORPORATION, and THE GARRETT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY

I. Respondents' Brief In Opposition Misses The Point And All But Admits That This Case Is Special and Important.

A. General.

Respondents' Brief in Opposition to Petition for Writ of Certiorari seeks to change or dodge the issues in this case as presented by the petitioners. Understandably, the respondents characterize the case as merely a matter of the proper exercise of judicial discretion and therefore not worthy of review by this Court. The gist of the respondents' Brief in Opposition is simply a restatement of the Petition for Writ of Certiorari, only from the respondents' point of view. Generalized, unsupported allegations are set forth as reasons for denying the writ. Nowhere do legitimate reasons appear.

For example, at page 12, the respondents state: "In reality, the Petition merely seeks yet another review of the trial court's evidentiary rulings without suggesting any different criteria to replace the well established and accepted review criteria applied by the Tenth Circuit in this case." This is an incredible statement. In the first place, the purpose of the Petition is to set out the significant issues along with reasons why this Court should review the case. Argument on the merits, inclusive of suggested criteria as would have provided a just result in the case under review, will be provided in the petitioner's Brief on the Merits, which follows the grant of the writ. Secondly, the case itself, as can now be seen by this Court, suggests the need for the appropriate standards and tests in the application of the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Finally, the "well established and accepted review criteria" alleged by the respondents to exist, do not exist at all, and are not identified by respondents.

B. Jury Instructions.

The respondents seek to argue around the recognized fact that the jury instructions were contradictory at best and

misstated Colorado law. The respondents simply adopt the Tenth Circuit's opinion, stating that the instructions were not prejudicial "when read in context" and because there was no finding of proximate causation. These are the issues raised by the petitioners, and for respondents to re-state the issues is not to address them. The Petition for Certiorari correctly pointed out that errors of law cannot be fairly corrected by some kind of "totality" concept, as expressed by the Tenth Circuit.

The petitioners were forced to try the case on both negligence and strict liability theories because of the Dassault defense that the autopilot, although incorporated in the model by Dassault, was *installed* by Falcon Jet Corporation, not Dassault, thus if defective when sold, was not Dassault's responsibility.

Petitioners' claim that the pilots' knowledge of autopilot defects was imputed to the passengers is not met by respondents' reference to the jury instruction Number 37 (Brief in Opposition at 5). This instruction was contradictory when compared to the erroneous jury instructions (27A, 29 and 30) on contributory negligence, and could only be confusing to the jury. The jury found the pilots were not negligent, thus the imputed negligence instruction did not come into play. What did come into play and continue to operate was the respondents' affirmative defense claims of misuse and assumption of the risk, imputing the pilots' *knowledge of the autopilot defect to the passengers.* Improperly, the jury was permitted by the trial court to consider the defense claim of pilot misuse and unreasonable and knowing use of a defective product as *defenses to the passengers' claims*, clearly contrary to state law.

As to the affirmative defenses of assumption of risk and product misuse, the respondents do no more than generally cite Colorado cases adopting the doctrine of strict liability and stating that the subject defenses may be available. The respondents fail altogether to address *Jackson* v. *Harsco Corporation*, 673 P.2d 363 (Colo. 1983), where the Supreme

Court of Colorado, reaffirming earlier decisions, held precisely that *a case must be reversed if there is insufficient evidence to support either defense.* There was, in this case, *no evidence whatsoever* to apply the defenses *to the passenger plaintiffs.* Nor do the respondents bother to explain why Fed. R. Civ. P. 46 should not be considered in conjunction with Fed. R. Civ. P. 51 in determining whether the court was adequately apprised of the plaintiffs' position in re: the jury instructions.

C. Bifurcation.

In arguing that standards are not needed in the application of Fed. R. Civ. P. 42(b), with reference to bifurcation of trials, the respondents again miss the point, simply reiterating the rule. The respondents fail to cite any findings made by the trial court as to whether the purposes of Rule 42(b) were served by ordering separate trials in this case. This matter, according to the respondents and the Tenth Circuit, falls entirely within the trial judge's discretion, with no basis for review. *That* is the point, and that is why Supreme Court review of this issue is needed.

II. The Respondent's Brief In Opposition Misstates The Facts And Wrongly Characterizes The Case.

A. Fed. R. Evid. Rules 403 and 407.

The respondents contend that this is not a Rule 407 case and generally downplay the significance of Fed. R. Evid. 407 in the outcome. In support of this contention they quote the separate, but concurring, opinion of Circuit Judge McKay as follows:

> I concur in result and in the opinion of the court *except to the extent that it purports to resolve the difficult question of possible conflict between state and federal rules of evidence.* As the court's opinion makes clear, that discussion is not necessary to our decision which properly rests on the independent

> ground of balancing mandated by Rule 403 and parallel state authority.

Moe v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 936 (10th Cir. 1984); Petition Appendix at A-38; Brief in Opposition at 9 (emphasis supplied).

Petitioners, too, cited Judge McKay's opinion (Petition at 25) because it points out that the majority of the court *did* decide Rule *407* issues. Indeed, this was the basis for Judge McKay concurring instead of joining in the opinion of the court.

Petitioners fully agree, and so stated, that crucial evidentiary questions were decided at the trial level on the basis of Fed. R. Evid. *403*, rather than Rule 407. And *that* is the issue. As clearly illustrated in the Petition, Rule *403* was improperly resorted to and was improperly used to *override* state law and policy. In fact, *Martinez* v. *Atlas Bolt & Screw Co.*, 636 P.2d 1287 (Colo. App. 1981), *cert. denied*, cited in respondent's Brief in Opposition at 13, lends additional support to petitioner's position. In *Martinez*, the Colorado Court of Appeals ruled:

> While evidence of subsequent repairs is generally inadmissible to prove negligence, *Barnes* v. *Safeway Stores, Inc.*, 30 Colo. App. 281, 493 P.2d 687 (1971), this negligence principle is not applicable in a products liability context. *Roberts* v. *May*, 41 Colo. App. 82, 583 P.2d 305 (1978). This is so because where, as here, an action is based on an alleged design defect, one important question is the existence of feasible alternatives. *Roberts* v. *May*, *supra*. Since a post-accident design change may bear directly on this issue, evidence of such a change generally is admissible. *Roberts* v. *May*, *supra*.
>
> *Here, the evidence offered by the plaintiff should have been admitted for impeachment purposes, to demonstrate the seriousness of the visibility limitation, and also to show the feasibility of*

installing equipment which would have remedied the problem.

The question of whether Atlas furnished sufficient instructions and warnings to C.F. & I. concerning the dangers inherent in the operation of the coke locomotive was a jury question and properly should have been submitted to the jury.

Accordingly, the judgement is reversed and the cause is remanded for a new trial.

636 P.2d at 1290 (emphasis supplied).

Overlooked by the Tenth Circuit (Petitioner's Brief at A-35) and contrary to respondents' Brief in Opposition, Exhibit 19, "Newsflash 16", *was offered* for both impeachment and rebuttal and should have been admitted pursuant to Colorado law and policy. Yet the trial judge's interpretation and application of Fed. R. Evid. 403 was allowed to prevail over substantive state law, even though the Tenth Circuit ruled state law was controlling, but contradictorily, upheld the trial court.

Respondents deny this proposition and its importance by employing the Tenth Ciruit's conclusion that a mere "paraphrase" is sufficient to fulfill the *impeachment exception* of Rule 407 and by incorrectly stating that, "Plaintiffs made no offer of Exhibit 19 to rebut defendants' evidence of pilot negligence and misuse." (Brief in Oppositon at 11.) Yet Exhibit 19 was *twice offered for rebuttal*, as can be seen from the trial transcripts, Appendix A and Appendix B to this Reply. The respondents apparently seek to mislead this Court and have it believe otherwise.

The application of Rules 403 and 407 were clearly in conflict in this case, and the Tenth Circuit rendered an inadequate and contradictory opinion in dealing with these nationally important issues. Hence, review by the Supreme Court of the United States is necessary.

B. NTSB Testimony.

In denying that this Court should review the question of allowing investigators of the National Transportation Safety Board to testify at trial pursuant to 49 U.S.C. §1441(e) and 49 C.F.R. §835.3, the respondents wrongly state that the contested testimony of NTSB Investigator Lewis concerned only Lewis' "observations at the accident scene which did not embrace any official Board opinion as to the probable cause of the accident." (Brief in Opposition at 23.) This view of the respondents is erroneous in the following respects:

1) The investigator's testimony was not based on his "observations at the accident scene" but, rather, was based on the examination of the aircraft engines at Denver, Colorado (*See*: Petition Appendices V and W), and *prior to Garrett* and AMD *disclosing* that the engine tailpipe had been known to implode or collapse previously.

2) 49 C.F.R. §835.3 prohibits NTSB *employees* from testifying to the *cause* of an accident, as opposed to prohibiting only "official Board opinion", as claimed by respondents.

III. Respondents' Argument Pertaining To Supreme Court Rule 21.5 Is Erroneous.

The respondents contend that the petitioners have failed to present the essential points for review with accuracy, brevity and clarity and that, therefore, the Petition should be denied pursuant to Supreme Court Rule 21.5 (Brief in Opposition at 5.) But prior decisions of this Court demonstrate clearly that the respondents here advocate an erroneous interpretation of Rule 21.5 and the purpose underlying the rule.

In *Tiger* v. *Lozier*, 275 U.S. 496 (1927), it was held that a petition for writ of certiorari would be denied for failure to comply with the predecessor of Rule 21 where the petition did not contain a concise statement of the facts, was 66 pages

long, set forth 47 "federal questions", and where the brief in support of the petition was 72 pages long, contained an appendix of 210 pages of excerpts from the record and was prefaced by 20 pages of "general propositions of law." In *Brown* v. *Krietmeyer*, 275 U.S. 496 (1927), where there was deemed a non-compliance with the predecessor of Rule 21, the petition was 51 pages long, contained no concise statement of facts, and the 72-page brief supporting the petition contained the same appendix as did the petition itself.

The purpose underlying the requirements of Rule 21 was set out in *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assoc.*, 242 U.S. 430 (1917), in which the Court stated that, absent compliance, the rights of interested parties may be prejudiced and the Court would be impeded in its effort to properly dispose of causes which crowd its docket.

Petitioners herein have fully complied with the requirements and limitations provided in the Supreme Court Rules relative to a petition for writ of certiorari. Petitioners properly raised six issues for review and presented five basic reasons why certiorari should be granted. All issues raised are pertinent to the decision rendered and markedly indicate that this case is "special and important". The rights of the respondents have not in any way been prejudiced, and no prejudice has been alleged by them. This Court now has before it the essential legal arguments and supported facts necessary to properly dispose of this cause.

CONCLUSION

By this Reply, petitioners rebut the essential contentions raised by the respondents in their Brief in Opposition. The respondents did not, in fact, raise a legitimate reason for denying certiorari in this case. The Brief in Opposition is cluttered with conclusory allegations and mere references to the opinion of the Tenth Circuit, *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir. 1984). For

reasons stated in their Petition, the petitioners respectfully ask this Court to review that opinion.

WHEREFORE, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

DATED this 17th day of August, 1984.

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APPENDIX "A"

Trial Proceedings
(R. Vol. 65 at 70-71)
Offer and Refusal of Exhibit 19, "Newsflash 16", for Rebuttal

THE COURT: Let's go through the defense exhibits, the additional exhibits you care to tender. Would you take this also.

MR. RAU: Just for the record, two more issues, The plaintiffs would again offer the entire message of Number 18 without the excised portions just as an offer of proof, and —

THE COURT: The tender will be reflected. It will be reflected, please.

MR. RAU: That will also go in Number 18, and Number 19 would also go to the punitive claim had punitive been an issue.

THE COURT: Thank you.

MR. RAU: And also Number 19, Your Honor, would go to rebuttal. At this time we are offering as rebuttal at this time. This is News Flash 16 to rebut the defendants' testimony that the pilot would have known that the autopilot was not disengaged.

THE COURT: The Court will refuse the tender. It will be reflected in the record, however.

MR. RAU: And, Your Honor, we have had an opportunity to check, and 3-B and 28 are exactly the same.

* * *

APPENDIX "B"

Trial Proceedings
(R. Vol. 67 at 62-63)
Offer and Refusal of Exhibit 19,
"Newsflash 16", for Rebuttal

THE COURT: I am prepared to rule on these two motions at this time. The motion for directed verdict by Garrett will be denied. The motion by the plaintiffs to dismiss the affirmative defenses of assumption of risk and misuse against plaintiffs' strict liability claims will be denied, likewise. Several motions will be denied.

MR. WARD: May we at this time make our motion for directed verdict?

THE COURT: Let's go into that right now, please.

MR. RAU: Your Honor, just one point. In light of the Court's ruling denying the dismissal of defenses, we would again tender Exhibit 19 for the purpose of rebutting the defendants' two affirmative defenses, misuse and unreasonable and knowing use of a defective product.

We think that Exhibit 19, News Flash 16, goes directly to those two defenses, and we would tender that exhibit again at this time for that purpose.

THE COURT: The tender will be refused. The record will reflect the retender. It will be refused.

MR. RAU: And our offer of proof would be that.

THE COURT: The Court will embody your previous offer of proof, and for the purposes of preserving the record, Exhibit 19 will be utilized. This has been attached to your motion. It will be considered in that context.

MR. RAU: Thank you, Your Honor.

THE COURT: Please.

* * *

CERTIFICATE OF SERVICE

I, L.B. Ullstrom, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of August, 1984, I served copies of this Reply Brief of Petitioners, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

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AFFIDAVIT OF MAILING

I, L.B. Ullstrom, one of the attorneys for the petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 17th day of August, 1984, I deposited in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Reply Brief of Petitioners.

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STATE OF COLORADO

ss.

CITY AND COUNTY OF DENVER

SUBSCRIBED AND SWORN to before me at Denver, Colorado this 17th day of August, 1984.

Betty Chadwick

NOTARY PUBLIC —
State of Colorado

My commission expires:

11/84